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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 288

MEMORIAL GARDENS ASSOCIATION, INC., GLENDALE MEMORIAL GARDENS, INC., AND EVERGREEN MEMORIAL GARDENS, INC.,

Appellants,

vs.

ELBERT S. SMITH, AS AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF ILLINOIS, AND EUGENE M. PRATT, AS STATE'S ATTORNEY OF THE COUNTY OF PEORIA, STATE OF ILLINOIS,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

JURISDICTIONAL STATEMENT.

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INDEX.

	PAGE
Citations	ii
Opinion Below	2
Jurisdiction	2
Question Presented	3
Statement of the Case	3
The Questions Are Substantial	10
(1) There is a conflict of decisions among the courts which have considered the constitutional question presented by this appeal	10
(2) The record contains no evidence which would sustain the challenged statute as a valid exercise of the police power	11
(3) The challenged statute is unreasonable, arbitrary and capricious	15
Appendix A	21
(Opinion of Supreme Court of Illinois)	21
(Opinions of Circuit Court of Sangamon County, Illinois)	36
Appendix B (Judgment below)	38
Appendix C (Statute involved)	40

CITATIONS.

Cases.

Falkner v. Memorial Gardens Association, 298 S. W. 2d 934 (Tex. Civ. App. 1957) 10

Memorial Gardens Association, Inc. v. Smith, 16 Ill. 2d 116, 156 N. E. 2d 587 (1959) 2

Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405 (1935) 11, 14

Nebbia v. New York, 291 U. S. 502 (1934) 12, 15

Standard Oil Co. of California v. Johnson, 316 U. S. 481 (1942) 2

State of West Virginia v. Memorial Gardens Development Corporation, 101 S. E. 2d 425 (W. Va. 1957) .. 10

Winters v. New York, 333 U. S. 507 (1948) 2

Statutes.

Illinois Laws of 1955, pp. 2020-22; Ill. Rev. Stat. 1955, Chap. 111½, pars. 73.101-73.108 3

28 U. S. C. § 1257(2) 2

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

JURISDICTIONAL STATEMENT.

Appellants, Memorial Gardens Association, Inc., Glendale Memorial Gardens, Inc., and Evergreen Memorial Gardens, Inc., Illinois corporations, appeal from the judgment of the Supreme Court of Illinois, entered on January 23, 1959, which became final upon the denial of rehearing on March 18, 1959, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW.

The opinion of the Supreme Court of Illinois, as modified upon denial of the motion for rehearing, is reported in 16 Ill. 2d 116 and in 156 N. E. 2d 587. The memorandum opinions of the Circuit Court of Sangamon County, Illinois, are unreported. Copies of the said opinions are set out in Appendix A hereto.

JURISDICTION.

This suit was brought by appellants in the Circuit Court of Sangamon County, Illinois, to enjoin the Auditor of Public Accoun's of the State of Illinois and the State's Attorney of Peoria County from enforcing the provisions of an act of the Illinois legislature entitled "An Act concerning agreements for furnishing or delivery of personal property, merchandise or services in connection with the final disposition of dead human bodies and regulating use or disposition of funds paid on said agreements and providing penalties for violation thereof", approved July 14, 1955, upon the ground that the Act is repugnant to the Fourteenth Amendment to the Constitution of the United States in that it constitutes an unwarranted and unlawful exercise of the police power, and is otherwise invalid. The Supreme Court of Illinois on January 23, 1959, affirmed the decree of the trial court dismissing the appellants' complaint for want of equity. A copy of said judgment is set out in Appendix B hereto. Appellants' petition for rehearing was denied on March 18, 1959, and notice of appeal was filed on June 15, 1959, in the Supreme Court of Illinois. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(2). The following decisions sustain the jurisdiction of this Court to review the aforesaid judgment by appeal: *Winters* v. *New York,* 333 U. S. 507 (1948); *Standard Oil*

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Co. of California v. *Johnson,* 316 U. S. 481 (1942). The Illinois statute involved is cited as Laws of 1955, pp. 2020-22; Ill. Rev. Stat. 1955, Chap. 111½, pars. 73.101-73.108, and the complete text thereof is set out in Appendix C hereto.

QUESTION PRESENTED.

Where the appellants, as owners and operators of twelve cemeteries in the State of Illinois, are engaged also in the sale of burial vaults and certain services in connection with the opening and closing of graves, on a so-called "pre-need" basis, under contracts which require that appellants shall set aside and maintain in a separate trust fund sufficient money, based upon present costs, to pay for such merchandise and services when delivery is requested, and where by the nature of this business the appellants are required to disburse substantial portions of the total sales receipts for salesmen's commissions and operational expenses, did the State of Illinois violate the Fourteenth Amendment to the Constitution of the United States by enactment of a law which prohibits the appellants from continuing in such business unless all payments received upon such contracts are deposited and held in trust until the death of the person or persons for whose burial such funds were paid?

STATEMENT OF THE CASE.

The appellants are Illinois corporations which own and operate twelve cemeteries in the State of Illinois. (R. 2 (35).) They are engaged in the business of selling grave spaces or burial lots in the said cemeteries and also sell grave markers, memorials, garden vaultoriums (commonly referred to as burial vaults), companionate memorials, family memorials, urns, and other personal property and merchandise of a like nature. In addition, the appellants

sell interment services which consist of the labor and equipment used in the opening and closing of a burial lot or grave, including the incidental use of chapel tents, lowering devices, greens, chairs and other equipment provided at the time of the graveside services conducted and performed by an undertaker or a funeral director. The cost of such interment services is paid to the appellants and not to the undertaker or funeral director. (R. 2 (36-37).)

Less than five per cent of the appellants' total sales are for cash. Over ninety-five per cent thereof are on the installment plan with the purchaser having up to three years to pay for the merchandise, lots and services purchased. Practically all of appellants' sales are made prior to need, *i.e.*, prior to the death of the purchaser. Such sales are made through salesmen who are paid a commission based upon a percentage of the purchase price of the various items sold. In the usual course of business, the appellants sell the lot first and, when it has been paid for in full, appellants' salesmen will call again upon the lot owner for the purpose of selling the markers, memorials, vaults and interment services. (R. 2 (37, 38).)

All sales by appellants are made pursuant to written contracts with the purchasers. (R. 2 (37).) The said contracts provide that, at any time after receipt of the full purchase price and upon the request of the purchaser, his heirs or assigns, the appellants will deliver the items purchased. When a cemetery lot has been paid in full, a deed or title to the spaces purchased will be delivered to the purchaser. The appellants will also deliver and install markers and memorials upon the lot purchased. However, appellants are seldom called upon to deliver burial vaults prior to death, and, of course, the interment services can only be performed when a burial is made. (R. 2 (40-41, 49-52).)

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In order to assure the performance of the delivery of the merchandise and services, the contracts provide that the seller will set aside and place in a trust fund sufficient money, based upon its present costs and its present wholesale costs with reliable manufacturers, to pay for the merchandise and services when delivered. In the case of installment payment contracts, the amount of money to be placed in the trust fund is accumulated by the seller from the installment payments received from the purchaser, and the same is required to be placed in trust within thirty days after the final payment is received. (R. 2 (52).) As of September 30, 1957, the appellants had deposited in an irrevocable trust account with the First National Bank and Trust Company, Pekin, Illinois, an aggregate amount of $294,853.91 to guarantee the performance of their obligations under their sales contracts. In addition, the appellants also had on deposit with said bank the sum of $96,216.88 earmarked for eventual transfer to the said irrevocable trust account. (R. 2 (41-42, 56-57).) The contracts provide that the income from such trust funds is to be used for the best interests of the seller, as its board of directors may determine (R. 2 (52)), and the appellants have used such income to help maintain and beautify the cemeteries. (R. 2 (38).)

The contracts contain an escalator clause which provides that, if at the time of delivery of the merchandise the cost thereof to the seller is less than at the date of the contract, the seller will refund to the purchaser such difference in cost; but, should the cost of such merchandise at the time of delivery be greater than at the date of the contract, the purchaser agrees to pay, as part of the purchase price, an additional sum exactly sufficient to cover such difference in cost. (R. 2 (53-54).)

The contracts contain a liquidated damages provision stating that, if the purchaser should default for more than

thirty days in any of the installment payments, the seller may, at its option, cancel the contract and retain all payments theretofore made by the purchaser. Exceptions are made in the case of illness, disability or unemployment. (R. 2 (54).)

Appellants are among the thirty-two corporations which are members of a service corporation known as Associated Cemetery Management, Inc., of Kansas City, Missouri. Said thirty-two corporations operate approximately two hundred cemeteries in twenty-two states. The Kansas City office employs approximately one hundred thirty persons, and the member corporations employ approximately six hundred salesmen, cemetery managers, office employees and cemetery maintenance personnel. Centralized accounting for all corporations and cemeteries in the group is performed at the Kansas City office on I. B. M. equipment. Each purchaser has an individual account record showing the lots, personal property and services purchased and the amount of each sale which is placed in the voluntary, irrevocable trust fund. Each cemetery maintains a local office where weekly or monthly payments are received. In Illinois these payments are deposited in Illinois banks and trust companies which are under the supervision of the Auditor of Public Accounts. Appellants employ approximately thirty-five salesmen, cemetery managers, clerks, stenographers and cemetery maintenance men. (R. 2 (39).)

The average retail sales price of vaults sold by appellants is $85.00. The appellants' costs of doing business in terms of percentages of such retail sales price are as follows: sales commissions, 30.6%; local office salaries 3%; cost of merchandise sold 29.4%; operational expenses (maintenance, supplies, caretakers' wages, gas, oil, legal, audit, postage, utilities, taxes, licenses, supplies) 33.2%. The average retail sales price of interment services sold

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by appellants is $30.00. The appellants' costs of doing business in connection therewith are as follows: sales commissions 24.9%; cost of services 66.6%. The average retail sales price of individual markers is $85.00, family memorials $168.50, and companionate memorials $237.50. The appellants' costs of doing business in connection therewith are comparable to their costs in the sale of vaults. (R. 2 (43).)

The total gross income for appellants' business in Illinois for the years 1953, 1954 and 1955 was $2,669,529.44, of which $800,787.89 was from the sale of lots, $1,679,048.02 was from the sale of merchandise, and the balance of $189,693.53 represented miscellaneous income from service charges, interest income from perpetual care and merchandise trust funds and opening and closing of graves. (R. 2 (44, 60).)

On July 14, 1955, the Governor of the State of Illinois approved an act of the 69th General Assembly entitled "An Act concerning agreements for furnishing or delivery of personal property, merchandise or services in connection with the final disposition of dead human bodies and regulating use or disposition of funds paid on said agreements and providing penalties for violation thereof." (R. 2 (36).) Since it would be impossible for appellants to conduct and operate their businesses, or to continue to conduct and operate their businesses, under the provisions of the aforesaid act (R. 2 (46)), the appellants on September 2, 1955, filed their verified complaint in the Circuit Court of Sangamon County, Illinois, to restrain and enjoin the appellees from enforcing it. On September 29, 1955, the court issued a temporary writ of injunction. (R. 2 (2).)

The case was tried on the amended complaint of the appellants on an agreed stipulation of facts. The federal question sought to be reviewed on this appeal, *i.e.*, that the

aforesaid statute is unconstitutional and void in that it constitutes an unwarranted and unlawful exercise of the police power in violation of the Fourteenth Amendment to the Constitution of the United States, was raised in the court of first instance by the allegations of the appellants' amended complaint (R. 2 (10, 15)), and by the denials of the appellees' answer. (R. 2 (26-27, 29).)

The decision of the trial court was in favor of the validity of the statute which appellants had challenged on the ground of its being repugnant to the Fourteenth Amendment to the Constitution of the United States, the court saying in its memorandum opinion dated May 16, 1958:

> "I do not believe that the statutory challenge (sic) by plaintiffs violates the due process clause of the Constitution, nor do I believe the Act unduly curtails the rights of contract. The only question which I might consider doubtful is whether the Act is a regulatory measure or a prohibitive (sic) measure. The Act in itself appears to be a regulatory measure, but whether the operation of the Act by reason of the amount of moneys deposited could be construed as confiscation is doubtful. I will resolve the doubt in favor of the defendants.
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>
> "In accordance with this opinion I will enter an order dissolving the temporary injunction and dismissing the complaint for want of equity upon proper application." (R. 2 (73-74).)

On June 26, 1956, the trial court entered a written order dismissing the amended complaint for want of equity and dissolving the temporary injunction. (R. 2 (69).) On the same date appellants filed a notice of appeal to the Supreme Court of Illinois from the said order. The federal question sought to be reviewed on the appeal to this Court was raised in the Supreme Court of Illinois by the said notice of appeal. (R. 2 (69-70).)

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The Supreme Court of Illinois affirmed the judgment of the trial court on January 23, 1959 (R. 18), and denied the appellants' petition for rehearing on March 18, 1959. (R. 22.) The following excerpts from the opinion of the Supreme Court of Illinois show that the federal question raised by appellants was passed upon by that court and that the decision was in favor of the validity of the challenged statute:

> "Plaintiffs urge that the act constitutes an unwarranted exercise of the police power; and that it is confiscatory of plaintiffs' business and thereby violates the due process provisions of the State and Federal constitutions. We will first consider this contention. (R. 9.)
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> "There can be no doubt that the act relates to a proper subject for the exercise of the police power. (R. 10.)
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> • • • • •
>
> "We do not believe that the present statute operates to prohibit plaintiffs' legitimate business. It does regulate the manner in which the business may be conducted.
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> • • • • •
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> "Plaintiffs contend that the act constitutes an unwarranted interference with the right of citizens to contract with each other and thus violates constitutional guarantees of both the State and Federal constitutions. (R. 13.)
>
> • • • • •
>
> "The regulations contained in the present act do not amount to an arbitrary or unwarranted interference with contract rights." (R. 14.)

THE QUESTIONS ARE SUBSTANTIAL.

(1) There is a conflict of decisions among the courts which have considered the constitutional question presented by this appeal.

Legislation similar to the Illinois statute challenged in the instant case has been passed on by the Supreme Court of Appeals of West Virginia and by the Court of Civil Appeals of Texas. In *State of West Virginia* v. *Memorial Gardens Development Corporation*, 101 S. E. 2d 425 (W. Va. 1957), a statute declaring pre-need contracts for the furnishing of personal property or funeral or burial merchandise or services, wherein the delivery or performance of the same is not immediately required, to be against public policy and void unless all money paid thereunder shall be paid to and held by a bank, trust company or savings and loan association, covered by federal insurance and authorized to do business in the state, and subject to withdrawal only by the purchaser before death and by the seller (trustee) thereafter, was held to constitute an unwarranted exercise of the police power of the state in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States. On the other hand, in *Falkner* v. *Memorial Gardens Association*, 298 S. W. 2d 934 (Tex. Civ. App. 1957), the validity of a similar Texas statute was upheld.

The West Virginia court considered the same federal constitutional question as was passed on by the Illinois court in the instant case, and it reached the opposite result, saying:

> "The statute here involved which requires impounding of all purchase money has prohibitory rather than regulatory effect, because no one could without other types of business or finances afford to engage in such business which allowed no expenditure of the funds for operational expenses, * * *.
>
> * * * * *

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> "For the reasons hereinbefore contained, we are of the opinion, and so hold, that the business of the defendant is not such as warrants the enactment by the State, under the police power, of the statute in question, and that Chapter 153 of the Acts of the Legislature, Regular Session, 1955, is unconstitutional to the extent heretofore indicated, * * *." (101 S. E. 2d at 432.)

The aforesaid conflict of decisions among the courts which have considered the question whether legislation of the type under attack herein is repugnant to the Fourteenth Amendment to the Constitution of the United States is, in itself, strong indication that the question presented by the instant appeal is substantial in nature and requires plenary consideration by the Court.

(2) The record contains no evidence which would sustain the challenged statute as a valid exercise of the police power.

The Supreme Court of Illinois attempted to justify the statute challenged in the instant case as a valid exercise of the police power of the state. (R. 9-12.) Appellants concede that the enactment of statutes having for their object the prevention of fraud, deceit, cheating, and imposition is within the police power of a state. But the validity of a statute as an exercise of the police power depends upon the set of facts to which it is applied.

In *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405 (1935), Mr. Justice Brandeis stated the rule as follows:

> "* * * *A statute valid as to one set of facts may be invalid as to another.* A statute valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably. * * *" (Emphasis supplied.) (294 U. S. at 415.)

So also in *Nebbia* v. *New York*, 291 U. S. 502 (1934), Mr. Justice Roberts stated the rule in similar language as follows:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. *It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the unreasonableness of each regulation depends upon the relevant facts.*" (Emphasis supplied.) (291 U. S. at 525.)

It is clear, therefore, that courts do not pass on the constitutionality of a statute in the abstract or upon the basis of surmise and conjecture, but only in light of the facts of a concrete case. And it is also clear that a court passing on the validity of a statute is bound by the facts contained in the record before it with the exception only of facts of which it may take judicial notice.

In attempting to discover justification in the facts contained in the record of the instant case for the challenged statute, the Supreme Court of Illinois said with reference to the sales contract used by the appellants:

> "We also note that while plaintiffs contend that the successful operation of their business requires the immediate deduction from payments of 32.1 per cent for commissions and over 36 per cent for other operational expenses, the agreement fails to advise the purchaser of such fact. The provisions of the guarantee-of-performance clause, though indefinite, are bound to induce

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purchasers to believe that they are providing a fund to insure their proper burial. *In view of such sales and operational expenses, the legislature undoubtedly considered the question of the ability of plaintiffs to fulfill their contractual obligations. In light of this background, we shall examine the charges of invalidity brought against the statute.*" (Emphasis supplied.) (R. 9.)

Later on in the opinion the court says:

"• • • The trust fund provisions of the act in question are designed to accomplish the same purpose, that is, to assure the purchasers that the company will be able to complete their contracts when the time for performance arrives. When we consider that contract payments are to be made in a maximum of three years and that the average time until performance of the 'pre-need' contracts is almost 29 years, the justice of the legislation becomes evident. *Plaintiffs, themselves, have recognized the need of some protection for the purchaser by including in their form of contract certain vague provisions relative to setting aside a trust fund. These illusory provisions furnish purchaser appeal, but fail to provide the protection which the situation warrants.*" (Emphasis supplied.) (R. 11.)

The court's conclusions questioning the ability of the appellants to perform their contractual obligations and labeling the guarantee-of-performance clause of the sales contracts as illusory are astonishing in view of the facts contained in the record before it. The record affirmatively shows that the appellants are engaged in a sound and substantial business and that the guarantee-of-performance clause of the sales contracts is far from being illusory. As of September 30, 1957, the appellants had on deposit in an irrevocable trust account with the First National Bank and Trust Company of Pekin, Illinois, the sum of $294,853.91 to guarantee the performance of its sales contracts. In addition the appellants also had on deposit with said bank

in a special account the sum of $96,216.88 which was earmarked for eventual transfer to the irrevocable trust account. (R. 2 (41-42).)

The record is devoid of any evidence to show that the appellants have ever failed to perform any of their contract obligations, nor does the record contain any assertion by appellees or fact leaving an inference that there has been anything fraudulently done by the appellants.

The record is also devoid of any evidence to show that any other person, firm, partnership, association or corporation has ever defaulted on any agreement or contract in the State of Illinois for the furnishing or performance of funeral services, or the furnishing or delivery of any personal property, merchandise, or services of any nature in connection with the final disposition of a dead human body, for future use at a time determinable by the death of the person or persons whose body or bodies are to be so disposed of, nor does the record contain any evidence that there has ever been anything fraudulently done by any such sellers.

Neither does the statute challenged herein contain any legislative finding or declaration of any need for the purported regulation.

Thus, the instant appeal presents a very substantial question as to whether the facts contained in the record, or of which the court could take judicial notice, were of such a nature that they could not conceivably establish that the challenged statute constitutes a valid exercise of the police power by the State of Illinois, and such question requires plenary consideration by this Court. *Nashville, C. & St. L. R. Co.* v. *Walters, supra.*

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(3) The challenged statute is unreasonable, arbitrary and capricious.

As was stated by the Court in *Nebbia* v. *New York, supra,* the Fourteenth Amendment does not prohibit governmental regulation for the public welfare, but it conditions the exertion of the admitted power "by securing that the end shall be accomplished by methods consistent with due process." The Court further stated that the guaranty of due process demands "that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." (291 U. S. at 525.) The Illinois statute in question on this appeal must be examined in the light of these guiding principles.

The pertinent provisions of the act provide that money paid to anyone on a contract for the furnishing or performance of funeral services, or the furnishing or delivery of any personal property, merchandise, or services of any nature in connection with the final disposition of a dead human body, for future use at a time determinable by the death of the person or persons whose body or bodies are to be so disposed of, shall be trust funds, and the person receiving the same is declared to be a trustee thereof. All such trust funds must be deposited in an Illinois bank within thirty days after receipt thereof. No person may accept such funds without first securing from the Auditor of Public Accounts a license to accept and hold such funds. A written application and a fidelity bond not exceeding $10,000 are required before the Auditor can issue a license. The Auditor may require an additional bond from time to time in amounts equal to one-tenth of the trust funds. The licensee must keep accurate accounts, books and records in the state of all transactions, and the licensee must make annual reports

to the Auditor. Every application must be accompanied by a fee of $10.00 and every report by a fee of $2.00. The books, records and accounts of the licensee are subject to investigation by the Auditor, and the cost of such examination must be borne by the licensee. The funds deposited pursuant to the act, and the interest thereon, cannot be withdrawn until the death of the person or persons for whose funeral or burial such funds were paid, unless sooner withdrawn and repaid to the person who originally paid the money under a contract. The trustee and the depositary are authorized to receive reimbursement from such funds for their reasonable expenses in the custody and administration of such funds and the usual and reasonable compensation for their services as such trustee and trustee's depositary, but the combined expenses and compensation cannot exceed 5% of principal and 5% of the earnings of the fund so deposited under each of the contracts. It is unlawful for any contract to provide for forfeiture of payments and retention of payments as liquidated damages for default therein in excess of 25% of the payments made or $35.00, whichever sum is larger. Violation of the act constitutes a misdemeanor punishable by fine or imprisonment or both.

It should be apparent at once that, while the foregoing statute purports to regulate sales on a pre-need basis of merchandise and services in connection with the final disposition of dead human bodies, its operative effect is to prohibit such sales. A seller cannot engage in such business unless all payments received upon contracts for such sales are deposited in trust until the death of the person for whose burial such funds were paid with no deductions permitted for salesmen's commissions or operational expenses in the interim. This provision of the law is wholly unreasonable, arbitrary and capricious and lacks any real or substantial relation to the object sought to be attained.

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There is an obvious public acceptance of pre-need selling in this field as evidenced by the fact that practically all of appellants' sales are made under this plan. (R. 2 (37).) The business is lawful, and appellants are authorized by their corporate charters to engage therein. (R. 2 (42).) Over 95% of the appellants' sales are on the installment plan with the purchaser having up to three years to pay for the merchandise and services. (R. 2 (37).) This necessitates considerable accounting expense. In the case of burial vaults, for example, the cost of the merchandise sold represents only 29.4% of the average retail sales price, whereas sales commissions amount to 30.6%, local office salaries 3%, and operational expenses 33.2%. In every normal business a substantial part of the retail selling price of the product sold goes to defray overhead expenses, and only a part thereof represents wholesale costs to the seller of the goods sold. To require a seller to place the entire proceeds of sales in trust for an indefinite period without the right to use any of the funds to defray his immediate costs of doing business has a prohibitory rather than a regulatory effect on the business.

The Supreme Court of Illinois has taken the position that "the trust fund provisions of the act in question are designed * * * to assure the purchasers that the company will be able to complete their contracts when the time for performance arrives." (R. 11.) But does not the appellants' form of contract accomplish this purpose in a natural and reasonable manner? Such form requires the appellants to set aside and place in an irrevocable trust fund sufficient money based upon their present costs to pay for the merchandise and services when delivered. Should the cost decline, the appellants agree to refund to the purchasers such difference in cost; but should the cost be greater at the time of delivery, the purchaser agrees to pay the difference as part of the purchase price. (R.

2 (52, 53-4).) The undisputed evidence shows that the appellants have faithfully observed this obligation of their contracts. Thus, the appellants by voluntary argeement have been furnishing to their purchasers a guarantee-of-performance as adequate as the state could reasonably require under a valid exercise of its police power.

Nevertheless, under the guise of the police power, the statute in question requires the appellants to put the entire retail sales price in trust. The statute says nothing as to what the retail sales price should be. The purported regulation does not say that the retail sales price should, in fact, be sufficient to complete the contract when the time for performance arrives. If the appellants fix the retail sales price of the merchandise at a fraction of the cost of delivery of the merchandise and services sold and place the sums received on the contract in trust, they have fully complied with the statute. Yet they have not assured the purchasers that they will be able to complete their contracts when the time for performance arrives. It should be perfectly obvious that the means employed by the statute do not have a real and substantial relation to the object sought to be obtained, viz., the protection of the purchaser, and that the statute is completely unreasonable, arbitrary and capricious.

The opinion of the Supreme Court of Illinois also states that "the legislature undoubtedly considered the question of the ability of plaintiffs to fulfill their contractual obligations." (R. 9.) Yet the court has construed the statute so as not to cover pre-need sales of monuments and memorials. (R. 16.) The record shows, however, that the retail sales price of individual markers is $85.00, family memorials $168.50, and companionate memorials $237.50, none of which is covered by the act, whereas the retail sales price of vaults is $85.00 and of interment services is $30.00, both of which are covered by the act. (R. 2

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(43).) The record also shows that appellants have made substantial pre-need sales of markers and memorials. (R. 2 (45).) If the statute in question is to be justified by the legislative concern over the ability of the appellants to perform their contracts, then why were pre-need sales of monuments and memorials excluded from the coverage of the statute? This is another illustration of the unreasonable, arbitrary and capricious operation of the statute.

If the object of the statute is to prevent fraud, deceit, cheating and imposition, as indicated by the Illinois court (R. 10), the means selected clearly have no real or substantial relation to the object sought to be obtained. The operative effect of the statute is not to regulate but to arbitrarily and capriciously prohibit a legitimate business in which the appellants are engaged. The instant appeal, therefore, presents a very substantial question as to whether the challenged statute operates to deprive the appellants of their liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and such question requires plenary consideration by this Court.

Respectfully submitted,

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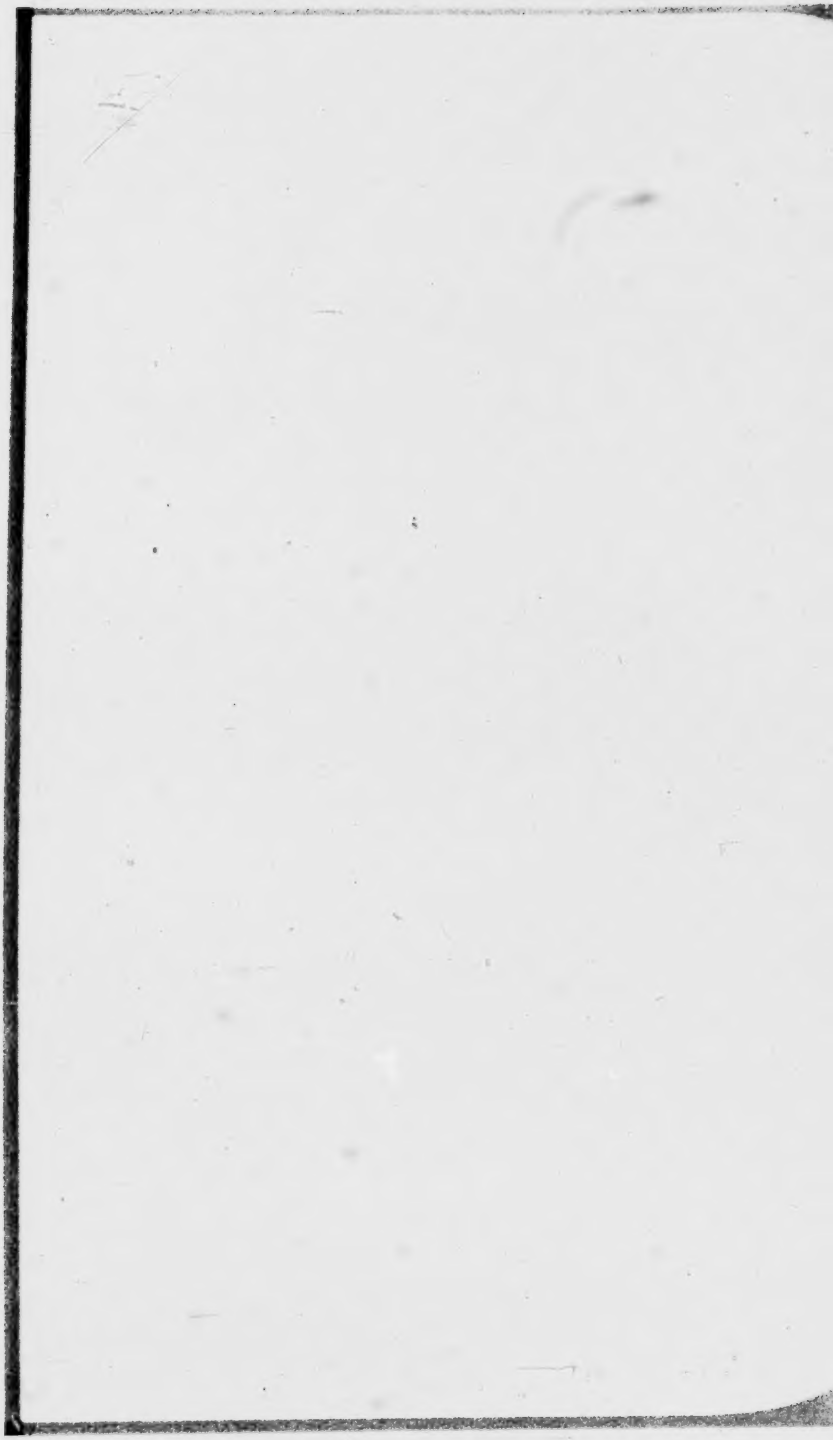

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APPENDIX A.

OPINION OF SUPREME COURT OF ILLINOIS.

Docket No. 35008—Agenda 43—November, 1958.

Memorial Gardens Association, Inc., *et al.*, Appellants, *vs.* Elbert S. Smith, Auditor of Public Accounts, *et al.*, Appellees.

MR. JUSTICE DAVIS delivered the opinion of the court:

Plaintiffs, Memorial Gardens Association, Inc., Glendale Memorial Gardens, Inc., and Evergreen Memorial Gardens, Inc., Illinois corporations, brought suit in the circuit court of Sangamon County against the Auditor of Public Accounts and the State's Attorney of Peoria County seeking to enjoin the defendants from enforcing the provisions of an act entitled "An Act concerning agreements for furnishing or delivery of personal property, merchandise or services in connection with the final disposition of dead human bodies and regulating use or disposition of funds paid on said agreements and providing penalties for violation thereof," passed on June 29 and approved on July 14, 1955. (Laws of 1955, pp. 2020-2022; Ill. Rev. Stat. 1955, chap. 111½, pars. 73.101-73.108.) The complaint alleged that the act was unconstitutional and otherwise invalid for the reasons herein discussed. At the request of plaintiffs, the court issued a temporary injunction. Defendants answered, denying the charges of unconstitutionality, and admitting the other material allegations of the complaint. The cause was submitted upon an agreed stipulation of facts. After hearing, the trial court dismissed the complaint for want of equity, but continued the temporary injunction in force pending direct appeal to this court based on the constitutionality of such enactment.

The pertinent portions of the act provide that money paid to anyone on a contract for the purpose of furnishing or performing funeral services, or the furnishing or delivery of any personal property, merchandise or services of any nature in connection with the final disposition of a dead human body, "for future use at a time determinable by the death of the person or persons whose body or bodies are to be so disposed of," shall be trust funds and the person receiving such payments is a trustee of such funds. It requires that monies so received be deposited within 30 days in a bank or trust company licensed to do business in this State; that the trustee furnish the depositary with the name of each payor and the amount of payment on each account; that persons or organizations receiving such payments obtain a license from the Auditor of Public Accounts, after giving specified information and filing a fidelity bond of not more than $10,000; that each licensee shall keep books and records of all transactions and shall make reports to the Auditor annually, or oftener if required; and that all records shall be subject to the Auditor's inspection and investigation. The act specifies that the amounts deposited and interest thereon shall not be withdrawn until the death of the person or persons for whose funeral or burial such funds were paid, unless sooner withdrawn and repaid to the original payor, or his legal representative, cases of forfeiture for nonpayment excepted. Forfeiture of payments made is limited to 25 per cent or $35. whichever is greater. The trustee and the depositary are authorized to receive from deposited funds their reasonable expenses and compensation in connection with custody and administration which shall not exceed in the aggregate 5 per cent of principal and 5 per cent of earnings of funds deposited in each case. Penalties are prescribed for violating the provisions of the act.

It appears from the agreed statement of facts that: The

plaintiffs own and operate 12 cemeteries in this State and are members of Associated Cemetery Management, Inc., a service corporation which performs accounting services for its members, which are corporations owning and operating over 200 cemeteries in 22 States. Plaintiffs are authorized to dispose of burial plots and to deal in caskets, burial vaults, grave markers and other merchandise connected with a cemetery or burial establishment. In addition to the sale of burial space, the plaintiffs' business consists principally of contracting for the sale of burial vaults, family and individual memorials or markers, and services in connection with the opening and closing of graves. The contracts for merchandise and services provide for delivery and performance by plaintiffs when items are fully paid for "upon request of the purchaser, his heirs or assigns." There is no performance by the company until full payment is made under the contract. In over 95 per cent of the cases, payments are to be made in installments extending over a period of three years. A 50-cent service charge is to be paid on each installment payment. In the event of default in any of the installment payments for more than 30 days the company may, at its option, declare the agreement null and void and retain the payments theretofore made as liquidated damages. Exceptions, limited to one year, are provided in the event of illness, disability or unemployment, upon notice to the company, with the further stipulation that the prospective purchaser shall supply the company monthly with satisfactory proof of the continuance of inability to pay. All contracts contain an escalator clause which provides that if the costs of merchandise or services at the time of delivery are greater than the cost at the date of contract, the purchaser shall pay an additional sum sufficient to cover the difference in cost, and if the costs to the company upon delivery are less than at the date of contract, the difference shall be refunded.

The contracts also contain a guarantee-of-performance clause whereby the company agrees that it will set aside and place in a trust fund "sufficient money, based upon its present costs and its present wholesale costs with reliable manufacturers to pay for said merchandise and services when delivered," and that the income therefrom shall be used for the best interests of the company, as its board of directors may determine. However, plaintiffs do not agree, in the case of an installment payment contract, to deposit any amount in such trust fund until all installments have been paid in full. Presently, plaintiffs have deposited over $294,000, in an irrevocable trust fund to guarantee performance and have deposited over $96,000 in a special account for future trust funds. Total gross income of plaintiffs for the years 1953, 1954 and 1955 was $2,669,529.44 of which $1,679,048.02 was from the sale of personal property and $800,787.89 from the sale of lots, the balance being represented by charges for the opening and closing of graves, interest from trust funds and service charges.

Plaintiffs employ salesmen on a commission basis and their commissions are due and payable at the time a contract is signed. In sales of merchandise, sales commissions average 32.1 per cent, local office salaries 3 per cent, cost of merchandise 31.3 per cent and various operational expenses 33.2 per cent of the purchase price, and the balance of .4 of 1 per cent is profit. The average price of vaults is $85, family memorials $168.50, companionate memorials $237.50 and interment services $30. While contracts are made with persons of all ages, more than half are executed with persons in the 40 to 50 year age bracket, who have an average life expectancy of almost 29 years according to the standard tables of mortality submitted by plaintiffs. Approximately 5 per cent of plaintiffs' sales of merchandise or services are made at need or at death, and about 95 per cent on the "pre-need" or before death plan.

It is apparent that the transactions between plaintiffs and their customers do not constitute present sales. The company agrees "to obtain for the benefit" of the purchaser the merchandise specified or substitutes therefor. The contract does not contemplate that delivery will be made or services rendered until after the death of the purchaser. Delivery may be, and usually is, made to his "heirs and assigns" and then only upon request and after full payment of the purchase price. On the contract date, the merchandise is not necessarily in possession of the company or even in existence. Meanwhile, for a period of time as indefinite as life, the company has possession and control of the purchase money paid and, though a trust fund is to be created to guarantee performance, only sufficient money will be set aside to pay for merchandise and services and such indefinite sum will not be set aside until the installment contract is paid in full. Moreover, the income to be earned from the funds set aside between time of payment and the death of the purchaser is "to be used for the best interests of the company or its nominees, as its board of directors may determine." Thus the benefits from such funds inure entirely to plaintiffs, while the risk of increased costs between the date of the contract and performance rests upon the purchaser.

We also note that while plaintiffs contend that the successful operation of their business requires the immediate deduction from payments of 32.1 per cent for commissions and over 36 per cent for other operational expenses, the agreement fails to advise the purchaser of such fact. The provisions of the guarantee-of-performance clause, though indefinite, are bound to induce purchasers to believe that they are providing a fund to insure their proper burial. In view of such sales and operational expenses, the legislature undoubtedly considered the question of the ability of plaintiffs to fulfill their contractual obligations. In the light of

this background, we shall examine the charges of invalidity brought against the statute.

Plaintiffs urge that the act constitutes an unwarranted exercise of the police power; and that it is confiscatory of plaintiffs' business and thereby violates the due process provisions of the State and Federal constitutions. We will first consider this contention. The police power is an attribute of sovereignty inherent in every government. It has been reserved to all the States by the constitution of the United States. (*Union Cemetery Ass'n* v. *Cooper*, 414 Ill. 23; 11 Am. Jur. p. 966, par. 245.) While it is not without limitation and may not be exercised arbitrarily, the legislatures of the States have broad discretion in the passage of statutes in its exercise. (*Union Cemetery Ass'n* v. *Cooper*, 414 Ill. 23, 32.) When the legislature has considered a problem and enacted legislation thereon, the act is presumptively a valid exercise of the power and the burden rests upon the one assailing the statute to show that it is without reasonable basis and entirely arbitrary. (*Union Cemetery Ass'n* v. *Cooper*, 414 Ill. 23, 32; *Stewart* v. *Brady*, 300 Ill. 425; *O'Gorman & Young, Inc.* v. *Hartford Fire Insurance Co.*, 282 U. S. 251, 75 L. ed. 324.) The enactment of statutes having for their object the prevention of fraud, deceit, cheating, and imposition is within the police power of a State. 16 C.J.S. page 924, par. 187; *Baim* v. *Fleck*, 406 Ill. 193; *Carolene Products Co.* v. *McLaughlin*, 365 Ill. 62.

There can be no doubt that the act relates to a proper subject for the exercise of the police power. The public has a vital interest in the proper disposition of the bodies of its deceased members. Persons engaged in this business have been subjected to rigorous regulation specifying the place and manner in which their activities may be conducted and proscribing such activities without license or permit. This has been done, not only out of proper respect for the dead,

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but in the interest of public health. Such regulatory statutes have not been confined to the business of undertaking and embalming. In this State burial societies which are engaged in the business of providing burial benefits for the payment of funeral, burial or other expenses on behalf of their deceased members, are subjected to certain compulsions, including the maintenance of reserves in the form of deposits with the Director of Insurance. (Ill. Rev. Stat. 1957, chap. 73, pars. 950-963, incl.) Under the provisions of the Cemetery Care Act, (Ill. Rev. Stat. 1957, chap. 21, pars. 64.1—64.24 incl.) cemeteries within the purview of the act are required to place funds paid for "perpetual care" in trust to guarantee performance of the obligations undertaken. In *Union Cemetery Ass'n* v. *Cooper,* 414 Ill. 2d 23, we held that act to constitute a valid exercise of the police power. In view of the provisions of the Insurance Code regulating the manner in which burial societies may conduct their business, and those of the Cemetery Care Act, exercising supervision over funds paid for the perpetual cemetery care, the provisions of the act in question requiring the deposit of funds in trust to guarantee contract performance are not unusual. There is nothing unique in requiring one who contracts for performance *in futuro* to give security for that performance. Thus, legislation requires contractors in public construction to give performance bonds, and compels insurance companies to maintain certain reserves and deposit security with administrative authorities charged with the supervision of their activities. The use of such bonds is generally accepted, and it is well settled that the insurance business is affected with a public interest and subject to control by the State in the exercise of its police power. 29 Am. Jur. p. 59, par. 22; *People ex rel. American Bankers Insurance Co.* v. *Palmer,* 363 Ill. 499, 508.

The contracts here involved are analogous to a form of insurance. By payments made during life, the purchas-

ers seek to insure their burial. The net effect is the same as though a life insurance contract were purchased to provide a sufficient sum payable at death to accomplish that result. In the case of insurance, the right of the legislature to require reserves and the deposit of security is unquestioned. The trust fund provisions of the act in question are designed to accomplish the same purpose, that is, to assure the purchasers that the company will be able to complete their contracts when the time for performance arrives. When we consider that contract payments are to be made in a maximum of three years and that the average time until performance of the "pre-need" contracts is almost 29 years, the justice of the legislation becomes evident. Plaintiffs, themselves, have recognized the need of some protection for the purchaser by including in their form of contract certain vague provisions relative to setting aside a trust fund. These illusory provisions furnish purchaser appeal, but fail to provide the protection which the situation warrants.

Plaintiffs cite *State* v. *Memorial Gardens Development Corp.* (W. Va. 1957), 101 S. E. 2d 425, in support of their contention that the act in question is not a proper exercise of the police power. In that case, the Supreme Court of Appeals of West Virginia held that a similar statute constituted an unlawful exercise of the police power and was invalid. However, there was a vigorous dissent from the opinion which, we believe, contains the better reasoning and is more in accord with general judicial precedent upon the question. In *Falkner* v. *Memorial Gardens Ass'n* (Texas, 1957), 298 S. W. 2d 934, the Court of Civil Appeals of Texas unanimously upheld the validity of an act almost identical to ours. But we need not look to foreign jurisdictions for authority in that *Union Cemetery Ass'n* v. *Cooper*, 414 Ill. 23, amply sustains our act. We there held that the preservation of funds for the perpetual care of

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graves is of sufficient public concern to invoke the exercise of the police power, and *a fortiori,* the preservation of funds to secure proper burial warrants the exercise of such power.

Plaintiffs urge, however, that the act is prohibitory rather than regulatory; that, if refused the right to make the unauthorized deductions from the trust fund, they will be unable to remain in business. They state that the immediate expenses, including commissions and general overhead items, make it impossible to deposit in trust the large amounts required by the act. The same contention was advanced in the West Virginia case and was sympathetically received by the court. It should be considered in the light of the fact that under the contracts in question plaintiffs are not required to make any expenditure until after request for performance and then only after the full purchase price has been paid, plus a service charge of 50 cents on each installment payment. The dissenting opinion in the West Virginia case suggested, and we agree, that it would be most unusual to expect or require prospective purchasers to "furnish or advance capital funds necessary for the operation of a business." (*State* v. *Memorial Gardens Development Corp.* (W. Va. 1957), 101 S. E. 2d 425, 439.) In the case at bar, plaintiffs entered this business by choice. Under their plan of operation they deem it necessary to deduct approximately two thirds of the purchase payments for immediate expenses and commissions and retain about one third of the purchase price to cover actual future commitments, while they assume no risk in connection with an increase in the costs of merchandise or services and receive the income from the sums retained. Such procedure invites regulation of a stringent nature. In the long interval between full receipt of the purchase price and contract performance, the opportunities for fraud are great and risk of insolvency, with consequent inability to perform, apparent.

The suggestion that actual costs are a minor item and that the legislature should have required a smaller deposit is unimpressive under the circumstances. The main thrust of plaintiffs' argument is that the regulations of the act will prevent the operation of its business of "pre-need" sales and that they will be compelled to cease business if forced to make sales only at the time of death. However, the act neither restricts plaintiffs' sales of such property at the time of death, nor prohibits "pre-need" sales. In *Acme Specialties Corp.* v. *Bibb*, 13 Ill. 2d 516, the statute under consideration banned the sale of sparklers except to persons licensed to hold public displays. Such provision materially restricted the sale of sparklers, yet we held that the enactment expressed a proper legislative objective and constituted a valid exercise of the police power.

We do not believe that the present statute operates to prohibit plaintiffs' legitimate business. It does regulate the manner in which the business may be conducted. Practically, plaintiffs will no longer be able to collect prospective profits in advance, without furnishing an adequate guarantee for performance. However, this does not prohibit the operation of this type of business. A large discretion is necessarily vested in the legislature to determine not only what the interests of the public welfare require, but what measures are necessary to secure such interests. (*Thillens, Inc.* v. *Morey*, 11 Ill. 2d 579, 593; *Union Cemetery Assn.* v. *Cooper*, 414 Ill. 23.) Plaintiffs' argument amounts to an admission that they will be unable to compete with others who sell the same merchandise and services at the time of actual need. However, the public welfare need not be abrogated to enable an individual to carry on his business in the particular manner in which he has elected to proceed. The analogy which plaintiffs seek to draw between their contracts and retail sales made on the "lay away" plan is fallacious. The "lay away" sale contemplates performance

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within a relatively short period of time upon payment of the purchase price. Opportunities for fraud are negligible and remedies for nonperformance are readily available.

Plaintiffs contend that the act constitutes an unwarranted interference with the right of citizens to contract with each other and thus violates constitutional guarantees of both the State and Federal constitutions. While rights of contract are favored and protected there is no principle of absolute freedom of contract. It is a qualified right and the State may, in its legitimate exercise of the police power, pass laws which limit or affect the right of contract so long as those regulations are reasonably necessary to secure the health, safety, morals or general welfare of the community. (*City of Chicago* v. *Chicago and North Western Railway Co.*, 4 Ill. 2d 307, 317.) The constitutional guarantee does not withdraw from legislative supervision that department of human activity which consists in the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies only the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. (*Crowley* v. *Christensen*, 137 U. S. 86, 34 L. ed. 620; *Chicago, Burlington & Quincy Railroad Co.* v. *McGuire*, 219 U. S. 549, 567, 55 L. ed. 325.) In the exercise of the police power it becomes necessary to prohibit some forms of contract entirely and to restrict others, yet the right to do so is unquestioned when the public welfare demands it. Thus the law may deny the common carrier and the telegraph company the right to make any contract with its patrons exculpating liability for negligence, may prohibit the purchase and sale of lottery tickets, and restrict the right of a minor or an incompetent to contract, except for necessaries. The regulations contained in the present act do not amount to an arbitrary or unwarranted interference with contract rights. The act neither prohibits the right to sell

the services or merchandise, nor proscribes advance collections. It does require that such funds, when collected, be set aside for the purpose for which they were intended. The public has a vital interest in securing that result and, insofar as the rights of plaintiffs are affected, those considerations must yield to the paramount public welfare.

Plaintiffs suggest that the act violates section 22 of article IV of the Illinois constitution because it confers special privileges upon the undertakers and funeral directors and therefore amounts to special or class legislation. Defendants have contended, and we agree, that it is difficult to read any classification into this act. It specifically covers "Any payment of money made to any person, partnership, association or corporation" for the goods or services of the type involved (Ill. Rev. Stat. 1955, chap. 111½, par 73.101), and applies alike to all who contract for the sale of such goods and services on a "pre-need" basis and collect therefor in advance. Funeral directors, undertakers, and embalmers are subject to the act if they elect to collect for such commodities in advance of actual need.

The contention that the subject of the act is not embraced within its title, and therefore violative of section 13 of article IV of the constitution, is without merit. Plaintiffs urge that there is nothing in the title to suggest the licensing and trust provisions of the act. We have been liberal in our construction of this constitutional mandate and have held that in order to render a provision of a statute void as not embraced in its title, the provision must be one which is incongruous or has no proper connection with the title of the act. (*Jordan* v. *Metropolitan Sanitary District of Greater Chicago*, ... Ill. 2d ....., ...; *People ex rel. Ryan* v. *Sempek*, 12 Ill. 2d 581, 586; *People ex rel. Coutrakon* v. *Lohr*, 9 Ill. 2d 539, 549.) The constitution is obeyed if all the provisions of the act relate to one subject indicated in the title and are parts of it, or incident to it, or

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reasonably connected with it, or in some reasonable sense auxiliary to the object in view. (*People ex rel. Brenza* v. *Gebbie,* 5 Ill. 2d 565, 587; *Union Cemetery Ass'n* v. *Cooper,* 414 Ill. 23, 39; *People ex rel. Lindstrand* v. *Emmerson,* 333 Ill. 606.) The title of the act involved is sufficiently broad to embrace its licensing and trust provisions. It is stated to concern agreements for furnishing or delivery of the services or merchandise in question and "regulating use or disposition of funds paid on said agreements." The aim of the constitutional requirement is to assure that the title of the act express in general terms its purposes to prevent surprise by the insertion of provisions unrelated to its subject which have no legitimate tendency to accomplish the ends expressed in the title. (*Union Cemetery Ass'n* v. *Cooper,* 414 Ill. 23, 39.) The word "subject" as used in the constitution signifies the matter or thing forming the groundwork of the act. It may contain many parts, originating in, or germane to it, which if traced back, will lead the mind to it as the generic head. (*People* v. *Sargent,* 254 Ill. 514.) The licensing and trust provisions of the statute all directly relate to the use and disposition of funds paid on the agreements. There is no element of surprise or incongruity and the statute conmplies with the constitutional mandate.

Plaintiffs further argue that the act is vague and indefinite and involves an unconstitutional delegation of legislative power to administrative officials in contravention of article III and section I of article IV of the constitution of this State. The act covers "the furnishing or delivery of any personal property, merchandise, or services of any nature in connection with the final disposition of a dead human body, for future use at a time determinable by the death * * *." Plaintiffs contend it is impossible to determine from this language just what merchandise or services are intended to be covered, and that the act is uncertain be-

cause it leaves to conjecture whether monuments and memorials are included. These latter items do not directly relate to the final disposition of a dead human body and are not within the scope of the act. Defendants concede this position and have stated that monuments, memorials and cemetery lots are excluded from the operation of the statute. Accordingly, we do not find the act vague and indefinite. The administrative provisions of the statute are similar to those of the Cemetery Care Act. (Ill. Rev. Stat. 1957, chap. 21, pars. 64.1-64.24.) In *Union Cemetery Ass'n* v. *Cooper*, 414 Ill. 23, we held that the latter act did not involve an unconstitutional delegation of legislative power. Much of what was said in that opinion applies here with equal force and reason. There is a distinction between the delegation of true legislative power and the delegation of subordinate authority to execute the law. (*People* v. *Warren*, 11 Ill. 2d 420, 427; *Lydy, Inc.* v. *City of Chicago*, 356 Ill. 230, 235.) While the legislature may not divest itself of its proper function of determining what the law shall be, it may authorize others to do those things which it might properly but cannot understandingly or advantageously do itself. (*City of Evanston* v. *Wazau*, 364 Ill. 198, 204.) The constitution does not require that the General Assembly establish absolute criteria whereby every detail and circumstance necessary in the enforcement of a law is anticipated; intelligible standards to guide the agency charged with enforcement are sufficient. (*People* v. *Warren*, 11 Ill. 2d 420, 427; *Hayes Freight Lines, Inc.* v. *Castle*, 2 Ill. 2d 58, 65.) We anticipate no difficulties in the administration of the present act which cannot readily be met. The contention that it involves an unconstitutional delegation of legislative power is without merit.

Finally, plaintiffs urge that the act establishes a trust where none can lawfully be created; that a buyer-seller relationship cannot be declared by statute to constitute a

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trustee-beneficiary relationship. They state: "We know of no case construing a statute wherein one of the two contracting parties has been declared by a court of final jurisdiction to be a trustee for the benefit of the other contracting party * * *." In this connection they unsuccessfully endeavor to distinguish *Union Cemetery Ass'n* v. *Cooper*, 414 Ill. 23, wherein this court sustained the validity of a statute requiring one of the parties to the agreement to hold funds received in trust for perpetual care. There is no essential difference between the acts in this respect. However, plaintiffs contend that the Cemetery Care Act involves a voluntary trust, whereas the statute in question attempts to create a trust of an involuntary nature. Yet funds may not be accepted for the purposes designated under either act without compliance with the regulatory provisions thereof. If the establishment of a trust is a proper method to protect the public interest and welfare in the one instance, it is not improper in the other. Discretion, as to the means to be employed in correcting an existing evil or avoiding a potential one, is vested in the legislature, and the courts should not interfere unless the method prescribed violates fundamental constitutional rights or is clearly prohibited by law. The fact that the legislature might have evolved a different or better plan furnishes no reason for invalidating an enactment which represents the collective judgment of the law makers on the subject.

The decree of the trial court dismissing the complaint for want of equity is affirmed. The cause is remanded to that court with directions to dissolve the temporary injunction which was continued in force pending this appeal.

Affirmed and remanded, with directions.

OPINIONS OF CIRCUIT COURT OF SANGAMON COUNTY, ILLINOIS.

Memorandum opinion of Judge DeWitt S. Crow, dated May 16, 1958, a verbatim copy being as follows:

May 16, 1958.

Hon. Latham Castle, Atty. Gen'l.,
(Mr. Richard W. Husted, Asst. Atty. Gen'l.),

Mr. George W. Hoffmann, Attorney,
Illinois Building,
Springfield, Ill.

Gentlemen:

Re: *Memorial Gardens Ass'n* v. *Hodge et al*—No. 896/55.

I have considered the briefs and arguments and have reviewed a great many of the cases cited in the briefs of both parties. I was particularly interested in the two cases of ***Falkner*** v. ***Memorial Gardens Association,*** 298 S. W. 2d 394, and *State* v. *Memorial Gardens Development Corporation,* 101 S. E. 2d 425, as applicable to the facts in this case. I do not believe I have considered a more interesting question than that raised, or have I found such divergent views from two Supreme Courts on the question as to the law being prohibitory or regulatory.

I do not believe the statutory challenge by plaintiffs violates the due process clause of the Constitution, nor do I believe the Act unduly curtails the rights of contract. The only question which I might consider doubtful is whether the Act is a regulatory measure or a prohibitive measure. The act in itself appears to be a regulatory measure, but whether the operation of the Act by reason of the amount of moneys deposited could be construed as confisca-

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tion is doubtful. I will resolve the doubt in favor of the defendants.

I have considered the other points, namely, (1) the trust provisions, (2) that the Title of the Act does not embrace the subject matter; and as to those two points I am resolving them in favor of the defendants.

In accordance with this opinion I will enter an order dissolving the temporary injunction and dismissing the complaint for want of equity upon proper application.

Memorandum opinion of Judge DeWitt S. Crow, dated May 29, 1958, a verbatim copy being as follows:

May 29, 1958.

Mr. George Hoffman, Attorney,
Springfield, Ill.

Hon. Latham Castle, Atty. Gen'l,
(Mr. Richard Husted, Asst. Atty. Gen'l),
Springfield, Ill.

Gentlemen:

In re: *Memorial Gardens Ass'n* v. *Elbert S. Smith, Auditor etc.* No. 896/55 Chan.

After writing the previous letter I have considered the plaintiff's answer to the defendant's brief and the oral arguments, and I have concluded that the stipulation cannot be considered by the Court as a binding conclusion of fact as to the plaintiffs' inability to continue in business. Even if the Court did so construe it as a fact, the question whether the particular Act is confiscatory is debatable, and the Courts are certainly in an area of disagreement as to whether if a business is a proper subject of regulation, an Act of the Legislature which does not expressly prohibit could be considered confiscatory.

I am, therefore, determining that the complaint should be dismissed and the injunction dissolved.

APPENDIX B.

JUDGMENT OF SUPREME COURT OF ILLINOIS.

Memorial Gardens Association, Inc., an Illinois corporation; Glendale Memorial Gardens, Inc., an Illinois corporation; Evergreen Memorial Gardens, Inc., an Illinois corporation,
Appellants,
vs.
Elbert S. Smith, as Auditor of Public Accounts of the State of Illinois, and James P. Kellstedt, as State's Attorney of the County of Peoria, State of Illinois,
Appellees.

No. 35008

Appeal from Circuit Court, Sangamon County 896 - 55

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the decree aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

THEREFORE, it is considered by the Court that the decree of the Circuit Court of Sangamon County aforesaid, BE AFFIRMED IN ALL THINGS AND STAND IN FULL FORCE AND EFFECT,

notwithstanding the said matter and things therein assigned for error, and this cause be remanded to the Circuit Court of Sangamon County with directions to dissolve the temporary injunction which was continued in force pending this appeal.

APPENDIX C.

An Act concerning agreements for furnishing or delivery of personal property, merchandise or services in connection with the final disposition of dead human bodies and regulating use or disposition of funds paid on said agreements and providing penalties for violation thereof. Approved July 14, 1955, Laws 1955, p. 2020.

§ 73.101 *Nature of payment.*

Any payment of money made to any person, partnership, association or corporation upon any agreement or contract, or any series or combination of agreements or contracts, which has for a purpose the furnishing or performance of funeral services, or the furnishing or delivery of any personal property, merchandise, or services of any nature in connection with the final disposition of a dead human body, for future use at a time determinable by the death of the person or persons whose body or bodies are to be so disposed of, shall be held to be trust funds, and the person, partnership, association or corporation receiving said payments is hereby declared to be a trustee thereof. 1955, July 14, Laws 1955, p. 2020, § 1.

§ 73.102 *Deposit of trust funds.*

All such trust funds shall be deposited in the name of the trustee, as trustee, within 30 days after receipt thereof, with either a bank or trust company authorized to do business in the State of Illinois, and shall be held in trust, subject to the provisions of this Act. The trustee at the time of making deposit shall furnish to the depositary

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the name of each payor, and the amount of payment on each such account for which deposit is being so made. 1955, July 14, Laws 1955, p. 2020, § 2.

§ 73.103 *License to accept funds—Application—Bond—Records—Annual report—Investigation of records.*

No person, firm, partnership, association or corporation may accept such trust funds, without first securing from the Auditor of Public Accounts (hereafter called the Auditor) a license to accept and hold such funds. Application for such license shall be in writing, signed by the applicant and duly verified on forms furnished by the Auditor. Each application shall contain at least the following: (1) The full name and address (both residence and place of business) of the applicant, and every member, officer and director thereof if the applicant is a firm, partnership, association or corporation. Any license issued pursuant to the application shall be valid only at the address stated in the application for such applicant or at such new address as may be approved by the Auditor; (2) a detailed statement of the applicant's assets and liabilities; and (3) applications for license shall be accompanied by a fidelity bond executed by the applicant and a surety company authorized to do business in this State in such amount not exceeding $10,000 as the Auditor may require. Upon receipt of such application and bond the Auditor shall issue a license unless he shall determine that the applicant has made false statements or representations in such application, or is insolvent, or has conducted or is about to conduct his business in a fraudulent manner, or is not duly authorized to transact business in this State. The Auditor may require additional bond from time to time in amounts equal to one-tenth of such trust funds, which bond shall run to the

Auditor for the use and benefit of the beneficiaries of such trust funds; provided that, in lieu of additional bond, and upon application by a licensee, and a showing that all such trust funds, pursuant to an agreement in writing approved by the Auditor, will be deposited in a trust account in and held by a bank or trust company qualified to do business as a trust company in this State, such licensee may by written permit of the Auditor, be authorized to operate without additional bond, except such fidelity bond as may be required by the Auditor for the protection of the licensee against loss by default by any of its employees engaged in the handling of trust funds. The licensee shall keep accurate accounts, books and records in this State of all transactions, copies of all agreements, dates and amounts of payments made and accepted thereon, the names and addresses of the contracting parties, the persons for whose benefit such funds are accepted, and the names of the depositaries of such funds. The licensee shall make reports to the Auditor annually or at such other time as the Auditor may require, on forms furnished by the Auditor. Every application shall be accompanied by a fee of $10.00 and every report shall be accompanied by a fee of $2.00. The licensee shall make all such books and records pertaining to such trust funds available to the Auditor for examination. The Auditor, or a qualified person designated by him, may at any time investigate the books, records and accounts of the licensee with respect to its trust funds and for that purpose may require the attendance of and examine under oath all persons whose testimony he may require. The cost of such examination shall be borne by the licensee. 1955, July 14, Laws 1955, p. 2020, § 3.

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§ 73.104 *Withdrawal of funds.*

The amount or amounts so deposited, with interest thereon, if any, shall not be withdrawn until the death of the person or persons for whose funeral or burial such funds were paid, unless sooner withdrawn and repaid to the person who originally paid the money under or in connection with said agreement or series of agreements, or to his or her legal representative; provided, that if the agreement or series of agreements provides for forfeiture and retention of any or all payments by reason of default in payment upon and according to the terms thereof, then upon any such default and forfeiture the trustee may withdraw such deposits; and further provided, nothing herein contained prohibits the change of depositary by the trustee and the transfer of trust funds from one depositary to another. 1955, July 14, Laws 1955, p. 2020, § 4.

§ 73.105 *Expenses in custody and administration of funds.*

This Act shall not be construed to prohibit the trustee and trustee's depositary from being reimbursed and receiving from such funds their reasonable expenses in the custody and administration of such funds and the usual and reasonable compensation for their services as such trustee and trustee's depositary, provided that the combined expenses and compensation shall not exceed the total of 5% of the principal fund and 5% of the earnings of the fund so deposited under each of the agreements or series of agreements. 1955, July 14, Laws 1955, p. 2020, § 5.

§ 73.106 *Forfeiture of payments.*

It is unlawful for any such agreement or agreements to provide for forfeiture and retention of payments upon any such agreement or series of agreements as and for

liquidated damages for default therein in excess of 25% of the payments made or $35.00, whichever sum is the larger. 1955, July 14, Laws 1955, p. 2020, § 6.

§ 73.107 *Severability.*

The invalidity of any section or part or portion of this Act shall not affect the validity of the remaining sections or part thereof. 1955, July 14, Laws 1955, p. 2020, §7.

§ 73.108 *Violation.*

Every president, treasurer, secretary or other officer of any corporation, and every agent, representative, servant or employee of any person, partnership, association or corporation, and every other person, who shall violate any of the provisions of this Act, or make any false and fraudulent report required under the provisions of this Act, is guilty of a misdemeanor and shall be punishable by a fine of not less than $100.00 and not more than $1,000.00, or by imprisonment in the county jail for not less than 10 days nor more than 3 months, or by both such fine and imprisonment. 1955, July 14, Laws 1955, p. 2020, § 8.

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INDEX.

	PAGE
Appellees' motion to affirm the judgment appeal from.	1
The Questions presented are not substantial.....	2
Certificate of Service.....	8

CASES AND STATUTES CITED.

Daniel v. Farmers Ins. Co., 336 U. S. 220, 222-3.....	2
Nebbia v. New York, 291 U. S. 502.....	6
State of W. Va. v. Memorial Gardens Dev. Corp., not yet reported, 101 S. E. 2d 425.....	6

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1959.

No. 288

MEMORIAL GARDENS ASSOCIATION, INC., GLENDALE MEMORIAL GARDENS, INC., and EVERGREEN MEMORIAL GARDENS, INC.,

Appellants,

vs.

ELBERT S. SMITH, as Auditor of Public Accounts of the State of Illinois, and EUGENE M. PRATT, as State's Attorney of the County of Peoria, State of Illinois,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

APPELLEES' MOTION TO AFFIRM THE JUDGMENT APPEALED FROM.

Appellees respectfully moved this Court to affirm the judgment of the Supreme Court of Illinois on the ground that this case does not present any substantial Federal question.

I.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL.

In *Daniel* v. *Farmers Ins. Co.*, 336 U. S. 220, this Court, recognizing that *ante mortem* contracts for funeral merchandise to be delivered at death are inherently so liable to abuse and so likely to result in imposition as to render constitutional legislation regulating *or prohibiting* such contracts, unanimously sustained an act of South Carolina that

> "provides that life insurance companies and their agents may not operate an undertaking business, and undertakers may not serve as agents for life insurance companies."

In language incisively pertinent to the instant case, this Court said at pages 222-3:

> "For many years South Carolina has prohibited the payment of insurance proceeds in merchandise or services. Act No. 205, S. C. Acts of 1929, p. 234; S. C. Code of 1942, §7984; Act No. 232, S. C. Acts of 1947, §65, p. 350. Possibilities of fraud, misunderstanding in valuation, and the comparatively useless character of the merchandise delivered or services rendered make respondents readily concede the desirability of this ban. Other states have similar statutes.
>
> "The South Carolina legislature might well have concluded that funeral insurance, although paid in cash, carries the same evils that are present in policies payable in merchandise or services: the beneficiary's tendency to deliver the policy's proceeds to the agent-undertaker for whatever funeral the money will buy, whether or not an expensive ceremony is consistent with the needs of the survivors. Considerations which might have been influential include the likelihood of overreach on the part of insurance companies, and the possibilities of monopoly control detailed in affidavits introduced in the court below."

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Respecting the contention of appellant in that case that "the statute has no relation to elimination" of the evils toward which it was directed, the Court said at page 225:

> "This rationale did not find expression in *Liggett Co.* v. *Baldridge,* 278 U. S. 105, on which respondents rely. According to the majority in *Liggett,* 'a state cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' 278 U. S. at 113. But a pronounced shift of emphasis since the *Liggett* case has deprived the words 'unreasonable' and 'arbitrary' of the content for which respondents contend. See *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U. S. 525, where the cases are reviewed."

Reversing the trial court's declaration that the statute was unconstitutional, the Court concluded its opinion at page 225:

> "The South Carolina statute, on its face, does not contravene the provisions of the Fourteenth Amendment. Neither does it offend the Amendment as applied to these respondents. We reverse the judgment below."

We quote, not of course as authoritative in this Court but as embodying the substance of Illinois' argument that the questions tendered by this appeal are not substantial, the following excerpts from the opinion of the Supreme Court of Illinois in this case (16 Ill. 2d 116, Appendix A to Appellant's Jurisdictional Statement). The Court said (Appendix, p. 30):

> "We do not believe that the present statute operates to prohibit plaintiffs' legitimate business. It does regulate the manner in which the business may be conducted. Practically, plaintiffs will no longer be able to collect prospective profits in advance, without furnishing adequate guarantee for performance. However, this does not prohibit the operation of this type of business."

The Court further said:

> "Plaintiffs' argument amounts to an admission that they will be unable to compete with others who sell the

~~same~~ merchandise and services at the time of actual need. However, this furnishes no reason to deny to the legislature the right to exercise the police power in the interest of the welfare by the regulation of the business of 'pre-need sales' in which all are free to engage, subject to the restrictions imposed. The public welfare need not be abrogated to enable an individual to carry on his business in the particular manner in which he has elected to proceed. The analogy which plaintiffs seek to draw between their contracts and retail sales made on the 'lay away' plan is fallacious. The 'lay away' sale contemplates performance within a relatively short period of time upon payment of the purchase price. Opportunities for fraud are negligible and remedies for nonperformance are readily available."

The court further said (Appendix, pp. 26-27):

"There can be no doubt that the act relates to a proper subject for the exercise of the police power. The public has a vital interest in the proper disposition of the bodies of its deceased members. Persons engaged in this business have been subjected to rigorous regulation specifying the place and manner in which their activities may be conducted and proscribing such activities without license or permit. This has been done, not only out of proper respect for the dead, but in the interest of public health. Such regulatory statutes have not been confined to the business of undertaking and embalming. In this State burial societies which are engaged in the business of providing burial benefits for the payment of funeral, burial or other expenses on behalf of their deceased members, are subjected to certain compulsions, including the maintenance of reserves in the form of deposits with the Director of Insurance. (Ill. Rev. Stat. 1957, chap. 73, pars. 950-963, incl.) Under the provisions of the Cemetery Care Act, (Ill. Rev. Stat. 1957, chap. 21 pars. 64.1—64.24 incl.) cemeteries within the purview of the act are required to place funds paid for 'perpetual care' in trust to guarantee performance of the obligations undertaken. In *Union Cemetery Ass'n* v. *Cooper*, 414 Ill. 2d 23, we held that act to constitute a valid exer-

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cise of the police power. In view of the provisions of the Insurance Code regulating the manner in which burial societies may conduct their business, and those of the Cemetery Care Act, exercising supervision over funds paid for the perpetual cemetery care, the provisions of the act in question requiring the deposit of funds in trust to guarantee contract performance are not unusual. There is nothing unique in requiring one who contracts for performance *in futuro* to give security for that performance. Thus, legislation requires contractors in public construction to give performance bonds, and compels insurance companies to maintain certain reserves and deposit security with administrative authorities charged with the supervision of their activities. The use of such bonds is generally accepted, and it is well settled that the insurance business is affected with a public interest and subject to control by the State in the exercise of its police power. 29 Am. Jur. p. 59, par. 22; *People ex rel. American Bankers Insurance Co.* v. *Palmer,* 363 Ill. 499, 508."

As the Supreme Court of Illinois noted, (Appendix, p. 24):

> "Plaintiffs employ salesmen on a commission basis and their commissions are due and payable at the time a contract is signed. In sales of merchandise, sales commissions average 32.1 per cent, local office salaries 3 per cent, cost of merchandise 31.3 per cent and various operational expenses 32.2 per cent of the purchase price, and the balance of .4 of 1 per cent is profit."

The average period of time between the inception of the contract and the death of the purchaser with consequent delivery of the items of funeral property involved, according to appellant itself, is 29 years.

Moreover, there is no assurance that the merchandise sold will be delivered for the price paid by the purchaser. An escalator clause may add to (or, of course, subtract from) the price of such items at the time of delivery upon the purchaser's death.

It thus appears that appellants are engaged in so precarious a venture, with cost of sales so high and operating profits so low that, for the protection of the public, Illinois, might well have categorically prohibited the enterprise as one in which appellant has no constitutional right to engage at all.

It is far too late in the day to urge that a state may not protect its gullible citizens against contracts for the sale of securities, insurance or commodity futures so improvident that loss is likely.

The truth is that appellant's business is so inherently fraught with the possibility of fraud and overreaching that the instant measure is a relatively moderate regulation of that business.

Nebbia v. *New York*, 291 U. S. 502, cited by appellant, which sustained New York's regulation of the price of milk, to the extent that that case is pertinent at all, supports Illinois rather than appellant in this case. Of course the fact that a regulation essentially reasonable may result in the inability of one subject to that regulation to continue in business does not invalidate the regulation.

There is no substantial conflict between the holding of the Supreme Court of Illinois in this case and *State of West Virginia* v. *Memorial Gardens Dev. Corp.*, not yet officially reported, 101 S. E. 2d 425, and the instant case. The West Virginia Statute required that *all* of the purchase price of appellant's items be subject to withdrawal at the time either of the death of the purchaser or his recission of the contract of purchase.

But even if West Virginia's supreme court had invalidated on federal grounds a measure identical with the instant Illinois act, it is not every diversity of pronouncements among State courts on federal questions that will render such questions substantial.

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For the reasons noted in the Illinois Supreme Court's opinion, the decision of a majority of the Supreme Court of West Virginia is so clearly wrong on its Federal grounds that it should not evoke this Court's jurisdiction.

For these reasons we respectfully submit that the appeal should be dismissed for want of any substantial federal question.

CERTIFICATE OF SERVICE.

I, William C. Wines, one of counsel for Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on or before the 26th day of August, 1959, I served copies of the foregoing Appellees' Motion to Affirm the Judgment Appealed from as follows:

By mailing five copies of said motion to

C. Sererin Buschman
900 Circle Tower
Indianapolis, Indiana

Roy P. Hull
First National Bank Bldg.
Peoria, Illinois

in duly addressed envelopes, postage prepaid.

WILLIAM C. WINES,
One of Counsel for Appellees.

Respectfully submitted,

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FILED
SEP 16 1959
JAMES R. BROWNING, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 288

MEMORIAL GARDENS ASSOCIATION, INC., GLENDALE MEMORIAL GARDENS, INC., AND EVERGREEN MEMORIAL GARDENS, INC.,

Appellants,

vs.

ELBERT S. SMITH, AS AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF ILLINOIS, AND EUGENE M. PRATT, AS STATE'S ATTORNEY OF THE COUNTY OF PEORIA, STATE OF ILLINOIS,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

APPELLANTS' BRIEF OPPOSING MOTION TO AFFIRM.

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INDEX.

	PAGE
Citations	i
Introductory Statement	1
Argument	2
Conclusion	7

CITATIONS.

Cases.

American Federation of Labor v. American Sash & Door Co., 335 U. S. 538, 542 (1949)	6
Daniel v. Family Security Life Ins. Co., 336 U. S. 220 (1949)	2, 3
Day-Brite Lighting, Inc. v. Missouri, 342 U. S. 421 (1952)	4, 6
Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U. S. 525 (1949)	4
Louis K. Liggett Co. v. Baldridge, 278 U. S. 105 (1928)	3
Morey v. Doud, 354 U. S. 457 (1957)	4
Nebbia v. New York, 291 U. S. 502 (1934)	3, 4

Rule.

Rule 16(1), Supreme Court of the United States	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 288.

MEMORIAL GARDENS ASSOCIATION, INC., GLENDALE MEMORIAL GARDENS, INC., AND EVERGREEN MEMORIAL GARDENS, INC.,

Appellants,

vs.

ELBERT S. SMITH, AS AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF ILLINOIS, AND EUGENE M. PRATT, AS STATE'S ATTORNEY OF THE COUNTY OF PEORIA, STATE OF ILLINOIS,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

APPELLANTS' BRIEF OPPOSING MOTION TO AFFIRM.

In view of the provisions of Rule 16(1) of this Court, it is apparent that the appellees should have filed a motion to dismiss the appeal, since the appeal is from a state court. A motion to affirm lies only when the appeal is from a federal court. However, assuming that the Court will treat the appellees' motion to affirm as a motion to dismiss, the appellants will now proceed to answer the points made in the appellees' motion.

ARGUMENT.

The appellees contend on page 2 of their motion that in *Daniel* v. *Family Security Life Ins. Co.*, 336 U. S. 220 (1949), this Court recognized that "ante mortem contracts for funeral merchandise to be delivered at death are inherently so liable to abuse and so likely to result in imposition as to render constitutional legislation regulating or prohibiting such contracts." The appellees, however, read too much into that case, for it does not support such a proposition. Moreover, the case is distinguishable on its facts.

The *Daniel* case involved a South Carolina statute prohibiting undertakers from serving as agents for life insurance companies. Most of the agents of the insurance company which challenged the statute were undertakers, and the insurance contract which the company sold contemplated use of the policy's proceeds to pay funeral expenses. A "facility of payment" clause might justify payment of proceeds to an undertaker for the insured's funeral. The Court concluded that it could not say that South Carolina was not entitled to call the funeral insurance business an evil. In support thereof it mentioned the beneficiary's tendency to deliver the policy's proceeds to the agent-undertaker for whatever funeral the money would buy, whether or not an expensive ceremony was consistent with the needs of the survivors. There was also the likelihood of overreach on the part of the insurance companies, and the possibility of monopoly control.

Thus, contrary to the appellees' contention, the *Daniel* case did not involve pre-need contracts for sale of funeral merchandise to be delivered at death. Moreover, such pre-need contracts protect the purchaser against the evils at

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which the South Carolina statute was directed. A person who purchases funeral merchandise under a pre-need contract knows what he wants and how much he is willing to pay for it. The sale is transacted in a calm and dispassionate setting. On the other hand, in the case of the purchase of funeral merchandise and services at the time of death, the undertaker usually makes the sale to a bereaved purchaser under circumstances of great emotional stress. Where the undertaker is also the insurance agent, a real possibility of imposition exists, since the undertaker will attempt to make a sale involving the entire proceeds of the insurance policy.

This Court properly held in the *Daniel* case that South Carolina was entitled to call the funeral insurance business an evil, and that the statute banning it had a relation to the elimination of the evil. But the present appeal does not involve funeral insurance or undertakers or any facts comparable to the situation in the *Daniel* case. The *Daniel* case, therefore, does not affect the substantialness of the question presented by the instant appeal.

The appellees at page 3 of their motion also quote language from the *Daniel* case regarding the pronounced shift of emphasis in the view of this Court which has deprived the words "unreasonable" and "arbitrary" of the content which formerly was accorded them. The appellants, however, are well aware of this change in the view-point of this Court. It was for this reason that the appellants in their jurisdictional statement relied on language from *Nebbia* v. *New York*, 291 U. S. 502 (1934), rather than on the case of *Louis K. Liggett Co.* v. *Baldridge*, 278 U. S. 105 (1928), in connection with the due process requirement that a law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

A good statement of the current due process philosophy

of this Court is contained in *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525 (1949), where Mr. Justice Black, in delivering the opinion of the Court, stated:

> "This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. See *Nebbia* v. *New York, supra,* and *West Coast Hotel Co.* v. *Parrish, supra,* and cases cited. Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." (335 U. S. at 536-7.)

Thus, while the recent decisions of this Court "leave debatable issues as respects business, economic, and social affairs to legislative decisions," *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421, 425 (1952), such decisions do not repudiate the principle that the guaranty of due process demands that a "law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." See *Nebbia* v. *New York,* 291 U. S. 502, 525 (1934).

A further indication that the guaranties of the Fourteenth Amendment are still applicable to state regulation under the police power is found in the recent case of *Morey* v. *Doud,* 354 U. S. 457 (1957). In that case the Court held that the Illinois Currency Exchanges Act, which excepted

the American Express Company from its operation, resulted in a denial of equal protection of the laws to those who were subjected to the requirements of the Act. The Court found that the statutory classification was arbitrary and had only a remote relationship to the Act's purposes or to business characteristics. While the case did not involve the due process clause, it does demonstrate that a state legislature can still transcend the limits of the Constitution in purporting to legislate for the public welfare.

The appellees contend on page 6 of their motion that pre-need selling of personal property, merchandise and services in connection with the final disposition of head human bodies is so precarious a venture that the State of Illinois might have categorically prohibited the enterprise as one in which the appellants have no constitutional right to engage at all. The appellants, however, submit that the record on the instant appeal contains no facts which would entitle Illinois to call pre-need selling an evil. On the contrary, an explication of the facts in the record, and of which the court may take judicial notice, would demonstrate that pre-need selling of merchandise and services for use in connection with the final disposition of dead human bodies is a positive good and serves a real public need.

Not only does the record not contain any evidence which would support a legislative ban on pre-need selling, but the statute itself does not purport to ban such activity but only to regulate the manner in which it can be conducted. The apparent legislative purpose in enacting the challenged statute was not to prohibit pre-need selling but rather to provide safeguards for the purchasers. However, the means which the legislature selected to accomplish this end utterly fail to safeguard such purchasers against fraud, deceit, cheating and imposition. See pages 15-19 of the jurisdictional statement. For example, the statute in

question does not deal in terms of costs of performance. Since sales of burial lots, markers and memorials are not covered by the statute, the statute can be effectively circumvented by tying a sale of a burial vault to a sale of a burial lot or marker and charging an inflated price for the lot or marker and a nominal price for the vault. If the seller then places the proceeds from the sale of the vault in trust, he has fully complied with the challenged statute, although the money deposited in the trust would not be sufficient to complete the contract when the time for performance arrives.

The challenged statute was designed to hit directly at the appellants' way of doing business and at its form of contract. The appellants' way of doing business and form of contract were formulated with a view of giving the purchasers a maximum of assurance that the merchandise and services sold will be delivered when the time for performance arrives. What the statute actually accomplishes is to drive the appellants and other honest and responsible sellers out of the business of pre-need selling of burial merchandise and services, but the way is left open for unscrupulous sellers to practice fraud and deception on unsuspecting purchasers. The statute is manifestly unreasonable, arbitrary and capricious in its operation, and the means which it employs have no real or substantial relation tc the object sought to be attained.

The present appeal does not call upon the Court to "sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare," *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421, 423 (1952), but presents a justiciable question which can be resolved by the application of rational standards. See Mr. Justice Frankfurter concurring in *American Federation of Labor* v. *American Sash & Door Co.,* 335 U. S. 538, 542 (1949), at page 557.

Under no view of the record can it be said that the question presented by this appeal is not substantial. It is substantial because it has not been foreclosed by prior decisions of this Court, and because there is a conflict of decisions among the state courts of last resort which have considered it, as shown at pages 10-11 of the jurisdictional statement.

Conclusion.

For the foregoing reasons and the reasons contained in the jurisdictional statement, the appellees' motion to affirm the judgment appealed from should be denied, and the Court should note probable jurisdiction.

Respectfully submitted,

C. Severin Buschmann,
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Paul J. DeVault,
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MEMORIAL GARDENS ASSOCIATION, INC., ET AL. *v.* SMITH, AUDITOR OF PUBLIC ACCOUNTS OF ILLINOIS, ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 288. Decided October 19, 1959.

Appeal dismissed for want of a substantial federal question.
Reported below: 16 Ill. 2d 116, 156 N. E. 2d 587.

C. Severin Buschmann and *Roy P. Hull* for appellants.

Grenville Beardsley, Attorney General of Illinois, and *William C. Wines*, *Raymond S. Sarnow* and *A. Zola Groves*, Assistant Attorneys General, for appellees.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

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